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C.C., Appellant)	
)	
and)	Docket No. 19-1268
)	Issued: April 2, 2021
U.S. POSTAL SERVICE, NETWORK)	
DISTRIBUTION CENTER, Dallas, TX,)	
Employer)	
)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On May 20, 2019 appellant filed a timely appeal from a December 4, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$6,390.34 for the period March 21 through May 26, 2018 because she continued to

² The Board notes that, following the issuance of the December 4, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal" 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

receive wage-loss compensation following her return to full-duty work; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On October 8, 2014 appellant, then a 57-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained injuries to her shoulders, knees, low and mid back, and sacral area due to her repetitive federal work duties, including standing, walking, bending, stooping, grabbing, lifting, and reaching. On May 7, 2015 OWCP accepted the claim for other bilateral affections of the shoulder region, bilateral sprain of the knee and leg, tear of the medial meniscus of the right knee, thoracic or lumbosacral neuritis or radiculitis, degeneration of lumbar or lumbosacral intervertebral disc, bilateral chondromalacia patellae, and tear of the lateral meniscus of the right knee. The acceptance letter informed appellant that wage-loss compensation for total disability was available only if she was unable to perform the duties of her regular position and that she should notify OWCP if she returned to work or obtained new employment. OWCP also advised appellant that, if she received compensation payments by electronic funds transfer (EFT), she should monitor her EFT deposits carefully, at least every two weeks. If she worked during a period in which she received compensation, she should notify OWCP in order that the overpayment could be collected.

OWCP paid appellant wage-loss compensation for total disability on the supplemental rolls, effective May 14, 2015, and on the periodic rolls, effective May 1, 2016. Appellant received wage-loss compensation by EFT payments.

By letter dated June 2, 2016, OWCP explained how the compensation rate was determined. It also informed appellant that, in order to minimize the possibility of an overpayment of compensation, she should notify OWCP immediately when she returned to work. OWCP again advised appellant to monitor her EFT payments carefully, at least every two weeks.

In a May 7, 2018 telephone memorandum (Form CA-110), appellant informed OWCP that she had returned to full-duty work on March 21, 2018. In a report of termination of disability and/or payment (Form CA-3) dated May 23, 2018, the employing establishment also informed OWCP that appellant had returned to full-duty work on March 21, 2018. It requested that OWCP remove her from the periodic rolls and declare an overpayment of compensation.

In a compensation termination calculation worksheet, OWCP terminated appellant's wage-loss compensation on March 21, 2018. Additionally, it noted that, for the compensation period March 21 to 31, 2018, appellant received an overpayment of \$1,049.16 on March 31, 2018, for the compensation period April 1 to 28, 2018, appellant received an overpayment of \$2,670.59 on April 28, 2018, and for the compensation period April 29 to May 26, 2018, appellant received an overpayment of \$2,670.59 on May 26, 2018, for a total overpayment of \$6,390.34.

On October 22, 2018 OWCP advised appellant of its preliminary overpayment determination that she had received an overpayment of compensation in the amount of \$6,390.34 for the period March 21 through May 26, 2018 because she received compensation for total disability after she returned to full-duty work on March 21, 2018. It also made a preliminary

finding that she was at fault in the creation of the overpayment because she had accepted payments that she knew or reasonably should have known to be incorrect. OWCP explained that over 30 days had elapsed since the EFT deposit was made, which allowed appellant ample time to receive and review a statement from her financial institution which showed the details of the improper payment. It requested that she complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20), and submit supporting financial documentation. Additionally, OWCP informed appellant that she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

In a Form OWCP-20 dated November 6, 2018, appellant listed total monthly income of \$1,192.00 and total monthly expenses of \$1,780.00. She reported assets of \$3,323.00 from cash and checking and savings accounts. Appellant submitted supporting financial documentation.

OWCP, by decision dated December 4, 2018, finalized the preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$6,390.34 for the period March 21 through May 26, 2018 because she continued to receive wage-loss compensation following her return to full-duty work. It determined that she was at fault in the creation of the overpayment as she accepted compensation payments which she knew or should have known were incorrect. OWCP ordered appellant to repay the \$6,390.34 overpayment in full within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.³

Section 8116(a) of FECA provides that, while an employee is receiving compensation or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.⁴ OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁵

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$6,390.34 for the period March 21 through May 26, 2018 because she continued to receive wage-loss compensation following her return to full-duty work.

³ *Supra* note 1 at § 8102(a).

⁴ *Id.* at § 8116(a).

⁵ *M.P.*, Docket No. 20-1035 (issued December 1, 2020); *L.T.*, Docket No. 19-1389 (issued March 27, 2020); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(g) (September 2018).

The record establishes that appellant returned to full-duty work at the employing establishment on March 21, 2018. OWCP continued to pay appellant wage-loss compensation for total disability from March 21 through May 26, 2018. As noted above, she was not entitled to receive compensation for total disability after her return to work.⁶ Thus, an overpayment of compensation was created in this case.

With regard to the amount of overpayment, the Board finds that OWCP properly calculated appellant's compensation paid for the period March 21 through May 26, 2018. Thus, the Board finds that appellant received an overpayment of compensation in the amount of \$6,390.34 for the period March 21 through May 26, 2018.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.⁷ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.⁸

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual will be found at fault if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.⁹

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁰

Section 10.433(b) of OWCP's regulations provides that whether or not an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding

⁶ *Supra* notes 4 and 5.

⁷ 5 U.S.C. § 8129(b).

⁸ *See J.S.*, Docket No. 19-1363 (issued April 10, 2020); *B.R.*, Docket No. 18-0339 (issued January 24, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *Gregg B. Manston*, 45 ECAB 344, 354 (1994); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

⁹ 20 C.F.R. § 10.433(a).

¹⁰ *Id.* at § 10.433(b); *see also M.P.*, *supra* note 5; *L.T.*, *supra* note 5.

the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹¹

The Board has held that an employee who receives payments from OWCP in the form of a direct deposit may not be at fault the first time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹² The Board has also held in cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from OWCP, or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.¹³ Previous cases have held that receiving one erroneous direct deposit payment does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that appellant was not at fault in creation of the overpayment for the period March 21 through 31, 2018.

OWCP paid appellant compensation by direct deposit every 28 days. Appellant returned to work on March 21, 2018. The first direct deposit she received after her return to work was made on March 31, 2018. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time the bank received the March 31, 2018 direct deposit that the payment was incorrect.¹⁵ The Board thus finds that she was without fault in accepting the initial direct deposit covering the period of the overpayment from March 21 to 31, 2018.

The Board further finds that appellant was at fault in the creation of the overpayment for the remaining direct deposit payments for the period April 1 through May 26, 2018.¹⁶

Although OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.¹⁷ In cases involving a series of incorrect payments, where the requisite knowledge is established by documentation from OWCP or simply with the passage of time and opportunity for discovery, a

¹¹ *Id.* at § 10.433(b); *see also* C.P., Docket No. 20-0648 (issued December 21, 2020); D.M., Docket No. 17-0983 (issued August 3, 2018).

¹² *See Tammy Craven*, 57 ECAB 689 (2006); *see also* A.B., Docket No. 18-0922 (issued January 3, 2019).

¹³ *See Tammy Craven*, *id.*; *see also* S.D., Docket No. 17-0309 (issued August 7, 2018).

¹⁴ *See C.H.*, Docket No. 19-1470 (issued January 24, 2020).

¹⁵ *See M.P.*, *supra* note 5; K.K., 19-0978 (issued October 21, 2019); K.E., *supra* note 8.

¹⁶ *See M.P.*, *supra* note 5; K.P., Docket No. 19-1151 (issued March 18, 2020); D.W., Docket No. 15-0229 (issued April 17, 2014).

¹⁷ *See M.P.*, *supra* note 5; B.W., Docket No. 19-0239 (issued September 18, 2020); L.T., *supra* note 5; P.B., Docket No. 19-0329 (issued December 31, 2019); C.G., Docket No. 15-0701 (issued December 9, 2015).

claimant will be at fault for accepting the payments subsequently deposited.¹⁸ By the time of the second and third payments, appellant should have known that she was not entitled to the same amount of wage-loss compensation as she had received prior to her return to work on March 21, 2018.¹⁹ After her receipt of the first direct deposit following her return to work, she was on notice that OWCP began to make payments to her in error and knew or should have known that she was not entitled to the benefits of the subsequent direct deposits.

In letters dated May 7, 2015 and June 2, 2016, OWCP advised appellant that an overpayment of compensation would be created if she returned to work, but continued to receive wage-loss compensation. It informed her that she should monitor her EFT deposits carefully, and immediately advise OWCP if she worked for any portion of the period for which a deposit was made. Therefore, by the time appellant received the second direct deposit on April 28, 2018, covering the period April 1 to 28, 2018, and the third direct deposit on May 26, 2018, covering the period April 29 to May 26, 2018, she knew or should have known that the continued payments were incorrect. The Board therefore finds that OWCP properly found that she was at fault in the creation of the overpayment from April 1 to May 26, 2018.

The Board therefore finds that this case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period March 21 through 31, 2018. The Board will set aside the December 4, 2018 decision regarding the issue of fault for that period and remand the case to OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment covering the period March 21 through 31, 2018.²⁰

The Board further finds that appellant was at fault in the creation of the overpayment resulting for the remaining direct deposit payments for the period April 1 through May 26, 2018,²¹ thereby precluding waiver of recovery of the overpayment.

CONCLUSION

The Board finds that at OWCP properly determined that appellant received an overpayment of compensation in the amount of \$6,390.34 for the period March 21 through May 26, 2018 because she continued to receive wage-loss compensation following her return to full-duty work. The Board further finds that appellant was without fault in the creation of the overpayment for the period March 21 through 31, 2018, but was at fault in the creation of the overpayment for the period April 1 through May 26, 2018. The case will be remanded to OWCP to consider waiver of recovery of the overpayment for the period March 21 through 31, 2018.

¹⁸ See *B.W.*, *id.*; *L.T.*, *supra* note 5.

¹⁹ *Id.*

²⁰ *M.P.*, *supra* note 5; *B.W.*, *supra* note 17; *L.T.*, *supra* note 5; *K.K.*, *supra* note 15.

²¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the December 4, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 2, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board